

the states. Rather, the federal regulatory scheme—and even the *specific federal regulation at issue*—substantially predate the state statute under scrutiny. Neither law nor logic supports the application of the presumption against preemption in a case, like this, where a *recently-enacted* state law conflicts with a *well-established* federal rule adopted as part of a longstanding federal regulatory regime. If the Court has any doubt on this score, it should invite the Solicitor General to submit a brief expressing the views of the United States on the recurring and important issues of the scope and applicability of the *Locke* exception.

**C. THE LOWER COURT'S HOLDING THAT BRONCO'S BRANDS ARE "INHERENTLY MISLEADING" CREATES A CONFLICT THAT WARRANTS REVIEW**

Respondents attempt to portray the decision below as merely applying "the well-settled principle that false and misleading speech is not protected by the First Amendment." NVVA Opp. 25. Tellingly, however, Respondents never address the erroneous standard employed by the court below in determining that the brands and labels at issue are unprotected—namely, whether they are "more likely to deceive the public than to inform it." App. 83a. Necessarily, therefore, Respondents fail to resolve the conflict between the decision below and the decisions of this and other courts employing a very different analytic approach.

Instead, Respondents merely assert, repeatedly, that "Bronco's brand names convey objectively false information." NVVA Opp. 25. Contending that the cases in which speech has been deemed *potentially* misleading rather than *inherently* misleading "all involved attempts to convey accurate information," Respondents conclude that the speech at issue here is beyond the scope of the First Amendment. *Id.* at 27. Contrary to Respondents' argument, however, this Court has not framed the distinction between inherently and potentially misleading speech in the binary terms of "objectively false" versus "accurate." In fact, the distinction

arises precisely because speech may have more than one connotation, and its truth or falsity may depend on the context or the audience or both.

For example, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985), this Court found it “self-evident” that “substantial numbers” of people would be deceived by an attorney’s advertisement that “fees” would be due only in the event of a recovery, because clients would not understand that “costs” were distinct from “fees” and would be due regardless of the outcome. Nevertheless, the Court held that the advertising was only potentially misleading because the deception could be cured by a disclaimer. *Id.* Similarly, as discussed in the Petition, a number of appellate courts have held that even demonstrably confusing or misleading speech cannot be suppressed absent a showing that mandatory disclosures cannot dispel consumer deception. *See* cases cited at Pet. 26; *see also* *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992) (state could not bar unlicensed persons from holding themselves out as “psychologists”; “danger” that consumers “will be misled” outweighed by First Amendment preference for “more disclosure, rather than less”); *Johnson v. Collins Entm’t Co.*, 564 S.E.2d 653, 666 (S.C. 2002) (offer of video “jackpots” above statutory limit would mislead consumers “unless clarification is provided”).

As the federal agency charged with regulating wine labeling concluded in the case of grandfathered geographic brands, an appellation of origin or “some other statement” is “sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.” 27 C.F.R. §4.39(i)(2)(iii). The agency correctly recognized what Respondents and the court below ignore, namely, that a brand name, even a geographic one, acquires, over time, significance as an indicator of a single source of the branded goods. *See* Pet. 25 n.14; *see also* Brief of 62 Wineries as Amici Curiae in Support of Petitioners at 16-19. In precisely this manner, Bronco’s brands, over their long period of use, have come to be associated with a single

source of the wines, and not as geographic indications. *See* Pet. 25 n.14. Unless additional disclosures would be wholly ineffective in curing any residual geographic confusion that the brands may cause, the brands and labels cannot be deemed *inherently* misleading. *See In re R.M.J.*, 455 U.S. 191, 203 (1982); *see also, e.g., Pearson v. Shalala*, 164 F.3d 650, 654, 658 (D.C. Cir. 1999) (health claims on dietary supplements could not be banned even where not supported by "significant scientific agreement" unless potential for deception could not be cured through additional labeling).

Here, the Legislature and the Court of Appeal, and now Respondents, simply assumed without analysis that additional disclaimers would not cure any vestigial deception arising from Bronco's brands and labels. Pet. 26-27. The decision below thus ignores the analytic framework established by this Court for determining when speech may be prohibited outright and when a state may only require additional disclosures and, in the process, deepens the confusion in the lower courts over that question. Accordingly, review is plainly warranted.

### CONCLUSION —

The petition should be granted.

DATED: January 10, 2006.

Respectfully submitted,

JEROME B. FALK, JR.  
STEVEN L. MAYER  
HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
A Professional Corporation

PETER M. BRODY  
(Counsel of Record)  
THOMAS W. BEIMERS  
ROPES & GRAY LLP  
  
KENNETH S. GELLER  
MAYER, BROWN, ROWE &  
MAW LLP

*Attorneys for Petitioners*